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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION  
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11 LEE C. GRIGGERS, ) No. ED CV 07-00285-VBK  
12 )  
13 Plaintiff, ) MEMORANDUM OPINION AND ORDER  
14 )  
15 v. ) (Social Security Case)  
16 )  
17 MICHAEL J. ASTRUE, )  
18 Commissioner of Social )  
19 Security, )  
20 )  
21 Defendant. )  
22 )  
23 )  
24 )  
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26 )  
27 )  
28 )

18 This matter is before the Court for review of the decision by the  
19 Commissioner of Social Security denying Plaintiff's application for  
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have  
21 consented that the case may be handled by the Magistrate Judge. The  
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to  
23 enter judgment upon the pleadings and transcript of the record before  
24 the Commissioner. The parties have filed their pleadings and  
25 supporting memoranda, and the Commissioner has filed the certified  
26 Administrative Record ("AR"). After reviewing the matter, the Court  
27 concludes that the decision of the Commissioner must be affirmed.  
28

**PLAINTIFF'S CONTENTIONS**

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") properly found that Plaintiff did not meet Listing 1.03B;
2. Whether the ALJ properly considered the treating physician's opinion of disability;
3. Whether the ALJ properly considered the State Agency opinion of functional status;
4. Whether the ALJ should have considered Plaintiff's mental impairment to be severe;
5. Whether the ALJ should have obtained testimony from a vocational expert ("VE").

**SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S CONCLUSION  
THAT PLAINTIFF DID NOT MEET LISTING 1.03B**

At the third step of the five step sequential evaluation process, a determination is made as to whether the claimant has an impairment or combination of impairments that medically meet or equal the severity requirements of one of the listed impairments set forth in Appendix 1 to subpart P, 20 C.F.R. Part 404 (Listing of Impairments). At this step of the evaluation, the burden is on Plaintiff to prove that he meets or equals all requirements of a particular Listing. A Listing "... describes for each of the major body systems impairments that we consider to be severe enough to prevent an individual from doing any gainful activity, ..." (20 C.F.R. §404.1525(a).) Medical equivalence is defined as an impairment that is "... at least equal in severity and duration to the criteria of any listed impairment." (20 C.F.R. §404.1526(a).) See also Tackett v. Apfel, 180 F.3d 1094, 1099

1 (9<sup>th</sup> Cir. 1999).

2 Here, Plaintiff claims that an employment accident which resulted  
3 in severe injury in the area of his left foot and ankle is an  
4 impairment of sufficient severity to meet Listing 1.03.<sup>1</sup>

5 An "inability to ambulate effectively," as set forth in the  
6 requirements of Listing 1.03, is defined in 1.00B2b as follows:

7 "Inability to ambulate effectively means an extreme  
8 limitation of the ability to walk; i.e., an impairment(s)  
9 that interferes very seriously with the individual's ability  
10 to independently initiate, sustain, or complete activities.  
11 Ineffective ambulation is defined generally as having  
12 insufficient lower extremity functioning (see 1.00J) to  
13 permit independent ambulation without the use of a hand-held  
14 assistive device(s) that limits the functioning of both  
15 upper extremities."

16  
17 Plaintiff utilized an orththotic device (a corrective sole lift  
18 in his left shoe). (AR 149, 197.) In that circumstance, §1.00J2 must  
19 be applied, and it is stated there that, "examination should be with  
20 the orththotic device in place and should include an evaluation of the  
21 individual's maximum ability to function effectively with the  
22 orthosis."

23 Plainly put, it was Plaintiff's burden to prove that he was

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24  
25 <sup>1</sup> In the Joint Stipulation ("JS"), Plaintiff misstates Listing  
26 1.03. (JS at 3-5.) Listing 1.03 states in its entirety the following:  
27 "Reconstructive surgery or surgical arthrodesis of a major  
28 weight-bearing joint, with inability to ambulate  
effectively, as defined in 1.00B2b, and return to effective  
ambulation did not occur, or is not expected to occur,  
within 12 months of onset."

1 unable to ambulate effectively. Plaintiff did claim that he required  
2 use of a cane, but the medical evidence does not support this  
3 allegation. The ALJ found that the record indicated Plaintiff had the  
4 ability to ambulate without a cane, although he did exhibit a left leg  
5 limp. (AR 36.) This conclusion is based upon the findings of Dr.  
6 Drake, the consultative examiner ("CE"), who assessed the Plaintiff  
7 can walk without a cane. (AR 133.) Plaintiff's treating physician  
8 stated that Plaintiff was able to stand or walk for up to two hours  
9 per day. (AR 149.)

10 The medical evidence does not support that Plaintiff meets or  
11 equals Listing 1.03. The ALJ's conclusion was supported by  
12 substantial evidence, and the Court finds no error in Plaintiff's  
13 first issue.

14  
15 **THE ALJ PROPERLY ASSESSED THE OPINION OF THE TREATING PHYSICIAN**

16 Plaintiff's second issue sets forth his contention that the ALJ  
17 did not properly consider the opinion of his treating physician, Dr.  
18 Holmboe. Dr. Holmboe provided a report dated June 10, 2003 based upon  
19 treatment records (AR 149-150), and on November 8, 2002, Dr. Holmboe  
20 communicated some assessments in a document entitled "Verification of  
21 Physical or Mental Disability (Food Stamp Program)." (AR 128.)  
22 Plaintiff recognizes that in the June 10, 2003 report, his treating  
23 physician opined that he could do sitting activities, on an  
24 "unlimited" basis, that he could drive an automobile, that he could  
25 walk for short distances from an automobile to a place of work, and  
26 that he could do up to one to two hours per day of standing or  
27 walking. (AR 149, JS at 8.) Plaintiff's contention, however, is that  
28 the ALJ failed to take notice of Dr. Holmboe's earlier report of

1 November 8, 2002 in which he provided the opinion that Plaintiff is  
2 mentally or physically unfit for gainful employment as a result of  
3 "severe ankle/foot deformity/arthritis and limb length discrepancy."  
4 (AR at 128, JS at 8.)

5 The ALJ found that Plaintiff is capable of sedentary work (AR 39,  
6 Finding 5), and based this conclusion in large part on the findings of  
7 the treating physician. The ALJ also gave substantial weight to  
8 opinions of State Agency physicians who had reviewed Dr. Holmboe's  
9 treatment records and the findings of the CE, Dr. Drake, who also  
10 concluded that Plaintiff is capable of sedentary work. (AR 38, 134-  
11 141, 162-169.) Since these non-examining physicians' opinions were  
12 consistent with the medical record, the ALJ was entitled to rely upon  
13 them. See Thomas v. Barnhart, 278 F.3d 947, 957 (9<sup>th</sup> Cir. 2002).

14 The question, then, is whether the ALJ missed something of  
15 substantial value by failing to mention the treating physician's  
16 statements in the November 2002 report concerning qualification of  
17 Plaintiff for food stamps. The Court concludes that he did not, in  
18 that it is the ALJ's function to review the medical evidence as a  
19 whole, and to provide an interpretation of it. Dr. Holmboe's November  
20 2002 conclusions as to disability are certainly not binding on the  
21 Commissioner, whose responsibility it is to determine the question of  
22 whether an individual is or is not disabled. Moreover, as a  
23 conclusory opinion on the ultimate question of disability, the ALJ was  
24 not bound to accept this statement. See Nyman v. Heckler, 779 F.2d  
25 528 (9<sup>th</sup> Cir. 1985).

26 Plaintiff does not dispute that the exertional limits assessed by  
27 Dr. Holmboe in the 2003 report are consistent with a sedentary  
28 exertional capability. Indeed, they are. (See 20 C.F.R. §416.967(a).)

1 Plaintiff also notes Dr. Holmboe's notation in his June 10, 2003  
2 report that Plaintiff has pain on a daily basis and that pain may also  
3 limit his activities to some degree. (See AR at 149, JS at 9.) But,  
4 Dr. Holmboe clearly incorporated an assessment of Plaintiff's pain  
5 when he formulated his conclusions as to Plaintiff's exertional  
6 abilities. The ALJ noted that Plaintiff's ability to perform  
7 sedentary exertional work was supported by the conclusions of his  
8 treating physician, and further noted that Plaintiff's allegations  
9 regarding the extent of his pain and functional limitations were not  
10 fully supported by the medical record. (AR at 37.) Plaintiff does not  
11 challenge the ALJ's credibility findings, which included the component  
12 of subjective pain.

13 The Court finds no error as to Issue No. 2.

14  
15 **THE ALJ DID NOT ERR IN ASSESSING PLAINTIFF'S**  
16 **MENTAL RESIDUAL FUNCTIONAL CAPACITY**

17 Plaintiff's third issue is that the ALJ failed to properly  
18 evaluate his mental functioning. In particular, Plaintiff notes that  
19 a State Agency reviewing psychiatrist, Dr. Williams, completed a  
20 Mental Residual Functional Capacity Assessment of September 3, 2003,  
21 in which it was noted that Plaintiff was "moderately limited" in his  
22 ability to interact appropriately with the general public, and in his  
23 ability to respond appropriately to changes in the work setting. (JS  
24 at 13, AR at 171.)

25 In evaluating psychiatric impairments, 20 C.F.R. §404.1520a(e)(1)  
26 and §416.920a(e)(1) require that consideration be given, among other  
27 things, to activities of daily living ("ADL"); social functioning;  
28 concentration, persistence or pace; and episodes of decompensation.

1 20 C.F.R. §§404.1520a(c)(1) and 416.920a(c)(1) require that  
2 consideration be given to "all relevant and available clinical signs  
3 and laboratory findings, the effects of your symptoms, and how your  
4 functioning may be affected by factors including, but not limited to  
5 chronic mental disorders, structured settings, medication and other  
6 treatment."

7 20 C.F.R. §§404.1545(c) and 416.945(c) require that consideration  
8 be given to "residual functional capacity for work activity on a  
9 regular and continuing basis" and "A limited ability to carry out  
10 certain mental activities, such as limitations in understanding,  
11 remembering, and carrying out instructions, and in responding  
12 appropriately to supervision, co-workers, and work pressures in a work  
13 setting, [which] may reduce your ability to ... work."

14 The types of relevant evidence to be assessed in making these  
15 considerations are set forth in Social Security Ruling ("SSR") 85-16,  
16 which include such factors as history, findings, and observations from  
17 medical sources, reports of the individual's activities of daily  
18 living and work activity, as well as testimony of third parties about  
19 the individual's performance and behavior.

20 Under 20 C.F.R. §404.1520a(c)(2) and §416.920a(c)(2),  
21 consideration must be given to the extent to which a mental impairment  
22 interferes with an "ability to function independently, appropriately,  
23 effectively, and on a sustained basis ..."

24 The degree of functional limitations in four broad areas (ADLs;  
25 social functioning; concentration, persistence or pace; and episodes  
26 of decompensation) are evaluated; that is, as to the first three  
27 functional areas, the following five-point scale is utilized: none,  
28 mild, moderate, marked, and extreme. With regard to the fourth area,

1 a four-point scale is utilized: none, one or two, three, four or more.  
2 (20 C.F.R. §§416.920a(3),(4) and 404.1520a(c)(3),(4).

3 Following the September 2000 amendments to the regulations which  
4 modified 20 C.F.R. §404.1520a(e)(2) and §416.920a(e)(2), the  
5 Administrative Law Judge ("ALJ") is no longer required to complete and  
6 attach a Psychiatric Review Technique Form ("PRTF"). Instead, these  
7 regulations require that in the decision, the ALJ,

8 "[M]ust incorporate the pertinent findings and conclusions  
9 based on the [PRTF] technique. The decision must show the  
10 significant history, including examination and laboratory  
11 findings, and the functional limitations that were  
12 considered in reaching a conclusion about the severity of  
13 the mental impairment(s). The decision must include a  
14 specific finding as to the degree of limitation in each of  
15 the functional areas described in paragraph (c) of this  
16 section." [That is, ADLs; social functioning; concentration,  
17 persistence or pace; and episodes of decompensation.]  
18

19 Further guidance is provided in SSR 85-16, which, although it  
20 does not specifically mention concentration, persistence or pace, does  
21 note, "Ability to sustain activities, interests, and relate to others  
22 over a period of time. The frequency, appropriateness, and  
23 independence of the activities must also be considered" as well as  
24 "ability to function in a work-like situation."

25 When there is finding of "moderate" difficulties in the area of  
26 maintaining concentration, persistence or pace, this factor must be  
27 included in any hypothetical question posed at a hearing to a  
28 vocational expert ("VE"). Thus, one court has held that referring



1 merely to "simple jobs" or "unskilled sedentary work" in a  
2 hypothetical question is insufficient to describe and to accommodate  
3 difficulties in this functional area. See Newton v. Chater, 92 F.3d  
4 688 (8<sup>th</sup> Cir. 1996).

5 The regulations do not provide a standard definition of  
6 "moderate." (See 20 C.F.R. §416.902a(c)(4).) They do note, however,  
7 that a finding of "none" or "mild" in the first three areas "will  
8 generally [mean] that your impairment(s) is not severe, ..." See 20  
9 C.F.R. §920a(d)(1).

10 In LaCroix v. Barnhart, 465 F.3d 881, 888 (8<sup>th</sup> Cir. 2006), the  
11 Eighth Circuit upheld an ALJ's finding that a claimant found to have  
12 a moderate limitation in her ability to respond appropriately to work  
13 pressures in a usual work setting would still be able to  
14 satisfactorily function in this area. (See Id. at 888.) The appellate  
15 Court noted that the evaluation form (HA-11) defined moderate as  
16 indicating that the individual could still function satisfactorily.  
17 (See, Id.)

18 Here, Dr. Williams indicated that Plaintiff only had "mild"  
19 difficulties in maintaining social functioning, but found no  
20 restrictions in the remaining areas of activities of daily living;  
21 maintaining concentration, persistence or pace; and there were no  
22 episodes of decompensation. (AR 184.) Thus, Plaintiff presented at  
23 best with "mild" limitations, which typically correlates with a non-  
24 severe mental impairment. See 20 C.F.R. §416.920a(d)(1).

25 Based on the foregoing, the Court concludes that the ALJ  
26 correctly concluded that Plaintiff's mental impairment was not severe.

27 In Plaintiff's fourth issue, which is related to the third issue,  
28 he questions whether the ALJ should have considered his mental

1 impairment to be non-severe. In fact, the ALJ did find that Plaintiff  
2 suffers from a depressive disorder, but that this impairment "has  
3 resulted in no restrictions of his activities of daily living and mild  
4 difficulties in maintaining social functioning." (AR 35.) As the  
5 Court has noted in its discussion of the third issue, the evidence in  
6 the record indicates that the existence of at best mild limitations in  
7 only one of the four broad functional areas supports the assessment of  
8 a non-severe depressive disorder which would have no more than a  
9 minimal effect on Plaintiff's ability to do basic work activities.  
10 Consequently, the Court finds no error pertaining to Issue No. 4.

11  
12 **THE ALJ WAS NOT REQUIRED TO OBTAIN TESTIMONY**

13 **FROM A VOCATIONAL EXPERT**

14 In Plaintiff's fifth and final issue, he asserts that even if,  
15 assuming arguendo, he does not meet Listing 1.03B, based on his  
16 asserted moderate mental limitations, and the existence of possible  
17 pain, the ALJ should have utilized a vocational expert ("VE") to  
18 assist in the decision-making process. (JS at 18.) Essentially,  
19 Plaintiff claims that it was erroneous for the ALJ to rely upon the  
20 Grids, because of the existence of these non-exertional limitations.  
21 But here, the particular non-exertional limitations asserted by  
22 Plaintiff were insignificant, for the reasons already discussed by the  
23 Court in this Opinion. Therefore, it was not erroneous for the ALJ to  
24 rely upon the Grids, since they provide a complete and accurate  
25 representation of Plaintiff's limitations. Here, Grid Rules 201.25  
26 and 201.26, relied upon by the ALJ, do in fact apply and do direct a  
27 finding of "not disabled." These Grid Rules did in fact coincide with  
28 Plaintiff's assessed residual functional capacity (an ability to

1 perform exertional work at the sedentary level), and for this reason,  
2 the ALJ was not required to obtain additional testimony from a VE.  
3 (See Desrosiers v. Secretary of Health and Human Services, 846 F.2d  
4 573 (9<sup>th</sup> Cir. 1988)).

5 There is no error as to Issue No. 5.

6 For the foregoing reasons, the Decision will be affirmed, and the  
7 matter will be dismissed with prejudice.

8 **IT IS SO ORDERED.**

9  
10 DATED: January 3, 2008

/s/  
VICTOR B. KENTON  
UNITED STATES MAGISTRATE JUDGE